IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM BOMAR JONES, dba AVY AIRR FLIGHT SERVICE,	)	
Appellant,	)	
vs.	)	No. 22232
THE CITY OF WINSLOW, a municipal corporation; et al.,	)	
Appellees.	)	

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE WESTERN
DISTRICT OF ARIZONA
HONORABLE WILLIAM P. COPPLE, Judge

APPELLEES' ANSWERING BRIEF

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SUPPLEMENTAL STATEMENT OF FACTS

The Appellant, William Bomar Jones, dba AVY Airr Flight Service, filed his action in the United States District Court for the District of Arizona against the City of Winslow, a municipal corporation; Henrie Lyet, individually and dba Desert Air Flight Service, and as manager of the Winslow Municipal Airport; Jacob Baker, Cody Eden, J. Lester Allen, Nick P. Juarez, Cecil McCormick, George Patterson, R. L. McNelly, individually and as members of the City Council of the City of Winslow; Dennis Sweeney, individually and as City Attorney for the City of Winslow; and The Justice Court of Winslow Precinct, County of Navajo, State of Arizona.

Appellant's action in the District Court

was filed in three counts and were as follows:

Count I alleged jurisdiction under the Commerce Clause of the Constitution of the United States, Article I, Section VIII, Clause III; Part II of the Interstate Commerce Act, 49 USC, Chapter 14; the 14th Amendment to the Constitution of the United States, Section I; and the Civil Rights Act, 42 USC, Chapter 21, (T.R. pg. 2). Also, that the controversy, exclusive of interest and costs, exceed the sum of $10,000.00. It was further alleged that Appellant was engaged in business as a commercial operator in flight operations and that on or about April 11, 1966, he had been given permission to use facilities consisting of office space at the Winslow Municipal Airport. That thereafter, on or about March 28, 1967, he was given notice to vacate this space and that thereafter, the defendant, City of

Winslow, caused to be served upon Appellant, a complaint of forcible detainer, filed in the Justice Court of Winslow Precinct, Winslow, Arizona. By reason of said act, Appellant alleged that he had advised the defendant, City of Winslow, that the action filed in the Justice Court was void as an attempt to regulate interstate commerce; that said act was in violation of 49 USC, Chapter 14, Federal Aid for Public Airport Development, Section 1110; that it deprived him of liberty and property without due process of law under the 14th Amendment to the Constitution of the United States and deprived him of equal rights under the law as given by the Civil Rights Act, 42 USC, Chapter 21. Count I contained only allegations and conclusions against two of the Appellees, City of Winslow, a municipal corporation and the Justice Court, Winslow

Precinct, Winslow, Arizona.

Count II, by reference, alleged all allegations of Count I and in addition thereto, alleged additional jurisdiction by reason of the Civil Rights Act of 1957, Title 28, Section 1343, U S C A, (T.R. pg. 5). Count II did not allege any violation of the Civil Rights Act of 1957 or any violation of the other jurisdictional statements contained in Count I. Plaintiff's second cause of action, in effect, concluded that the defendants had unlawfully and maliciously endeavored to destroy plaintiff's business by publication of false and malicious reports and accusations concerning the plaintiff.

Count III of plaintiff's complaint, by reference, reaffirmed the allegations contained in Counts I and II of his complaint. Plaintiff further alleged that the defendants

had conspired together in restraint of trade and used unfair competitive practices for the purpose of creating a monopoly in the aviation operations in and about the City of Winslow and for the purpose and intent of injuring the business of the plaintiff. It further alleged unfair competition practices by the City of Winslow and the defendant, Henrie Lyet.

The complaint set forth allegations asking for a Temporary Restraining Order against the defendants with specific reference to the action pending in the Justice Court of the Winslow Precinct. A Temporary Restraining Order was granted by the United States District Court and thereafter by stipulation of counsel, a Preliminary Injunction was issued by the Court pending determination of the action filed by plaintiff.

Thereafter, motions to dismiss were filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for and upon the grounds that the complaint failed to state a claim upon which relief could be granted. The motion filed for and on behalf of the City of Winslow, together with the memorandum in support thereof, (T.R. pg. 24-29 incl.), attacked the plaintiff's complaint insofar as it applied to the allegations against the City of Winslow and insofar as the responsibilities of the City of Winslow existed under the allegations and the applicable federal statutes and Constitution provisions alleged in plaintiff's complaint.

A Motion to Dismiss for failure to state a claim upon which relief could be granted was filed on behalf of the defendants, Dennis Sweeney, individually and as City Attorney

for the City of Winslow and the Justice Court of Winslow Precinct, County of Navajo, State of Arizona, together with a supporting memorandum, (T.R. pg. 30-32 incl.). The same motion was filed on behalf of all other named defendants, together with a supporting memorandum, (T.R. pg. 33-36 incl.).

QUESTIONS PRESENTED

Appellant has designated three specifications of error (A.B., pg. 5, 6), which present two basic questions for this Court's consideration. They are as follows:

> Does the Court have the discretionary power to dismiss a verified, sworn and uncontradicted complaint, for failure to state a claim upon which relief may be granted?
>
> Does the District Court abuse its discretion in refusing to allow an amended complaint to be filed after having dismissed the

original complaint for failure to state a claim upon which relief may be granted?

ARGUMENT

In answer to the first, it is obvious that Rule 12(b)6 allows for dismissal of a complaint upon its failing to state a claim upon which relief may be granted. Such motion is the proper method of testing a complaint. Waldes Kohinoor, Inc. v. Stabile, SD NY 1956, 140 F. Supp. 917; United States v. United States Tin Corp., D. Alaska 1957, 148 F. Supp. 922; Reliable Mach. Works v. Unger, SD NY 1956, 144 F. Supp. 726.

Verification of the complaint, done in this case for the purpose of obtaining, without notice, a Temporary Restraining Order, does not make the complaint sacred and beyond attack under appropriate circumstances.

It is submitted that motions to dismiss should be granted where it clearly appears from the complaint that on the facts pleaded the plaintiff will not be entitled to any relief, and where additional detail could not buttress the complaint. Gilbertson v. City of Fairbanks, C. A. Alaska, 1959, 262 F.2d 734; Haldane v. Chagnon, C.A. Cal. 1965, 345 F.2d 601. The lower Court without question had the inherent right to dismiss plaintiff's complaint upon defendant's motions.

The only real question, is whether the Court may grant such motions directed to the plaintiff's complaint and deny plaintiff the permission to file an amended pleading. This is a discretionary matter resting with the trial court after a consideration of the facts and circumstances of the case, and such ruling will not generally be disturbed unless

the lower court has abused its discretion. Watson v. Employers Liability Assur. Corp., C.A. La. 1953, 202 F.2d 407; motion denied 75 S.Ct. 24, 348 U.S. 804, 99 L.Ed. 635, rev. on other grounds 75 S.Ct. 166, 348 U.S. 66, 99 L.Ed. 74, rehearing denied 75 S.Ct. 289, 348 U.S. 921, 99 L.Ed. 722; Hall v. National Supply Co., C.A. Tex. 1959, 270 F.2d 379.

While conceding that the court, in passing on a Motion to Dismiss, should take as true, in the light most favorable to plaintiff, all facts which are well pleaded, it is an equally familiar doctrine that only material facts and not the unsupported conclusions of the pleader are considered in that atmosphere. If it appears from those facts that plaintiff will not be entitled to any relief, then a Motion to Dismiss is proper and should be

granted. Foshee v. Daoust Const. Co., 7th Cir., 1950, 185 F.2d 23, Publicity Building Realty Corporation v. Hannegan, 8 Cir., 139 F.2d 583, 587; Dunn v. Gazzola, 1 Cir., 1954, 216 F.2d 709.

Plaintiff pleaded numerous federal laws and statutes, thereby concluding jurisdiction for his action. It is submitted that the only material facts pleaded in his complaint were the residence and capacities of the defendants; the notice to vacate his office given by the City of Winslow and the filing by the City of Winslow of an action of forcible detainer against plaintiff. All other items pleaded in plaintiff's complaint are mere conclusionary allegations and are unsupported by any material facts. The allegations against all defendants are commingled and it is difficult to differentiate the allegations against the

various defendants or between the actions sought to be stated.

In seeking to enjoin the Justice Court and the other defendants from proceeding with the forcible detainer action, Appellant alleged conclusions and failed to set forth any specific grounds for relief. Generally, in the absence of such allegations, injunctive relief will not be granted. Fleming v. Dierks Lumber and Coal Co., 39 F.Supp. 237; Bowles v. John F. Casey Co., D.C. Pa. 1946, 5 F.R.D. 143. All defendants against whom this relief was sought were either officials of the City government, the Justice Court or the City of Winslow itself. In such capacities, they are entrusted with discretionary powers and the exercise of such discretion is not to be generally controlled by injunctive relief. Adams v. Nagel, 303 U.S. 532, 58 S.Ct. 687,

82 L.Ed. 999.

The City of Winslow and its officials have an inherent right to control the property of the City. They may do so as if they were a private owner. Sections 2-301, 2-305 of the Arizona Revised Statutes, 1956, provide as follows:

> 2-301: "The governing body of a city or town or the board of supervisors of a county may acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate airports for the use of aircraft within or without the limits of the municipality, and for that purpose may use property suitable therefor which is or may hereafter be owned or controlled by the city, town or county."
>
> 2-305: "A city, town or county may accept and hold real property or any interest therein, by gift, trust or purchase or any other manner for the purpose of establishing, constructing, operating or maintaining airports or for uses incidental

thereto, subject to such terms and agreements as the governing body may deem advisable."

Appellant's interest in the airport was pecuniary and self-serving. It is submitted that he has no inherent property right to insist on maintaining any of the facilities. The City should have the right to control its facilities even to the extent of an exclusive franchise, should it desire. Hertz v. Tucson Airport Auth., Ariz., 299 P.2d 1071; Bluebird Air Service, Inc. v. Chicago, 376 Ill. 272, 33 N.E.2d 456; Hillsborough County Av. Auth. v. National Airlines, Inc., 63 So.2d 61, 40 ALR 2d 1056; Harrison County Court v. West Virginia Air Service, 132 W. Va. 1, 54 S.E.2d 1.

It is further suggested, that with reference to the injunctive relief sought by plaintiff, that he had plain, speedy and

adequate remedies in the Court where the forcible detainer was pending. He could appear and defend and had his right of appeal in the event of an adverse judgment. The Arizona Revised Statutes provide as follows:

Section 22-261:

> "A. Any party to a final judgment of a justice of the peace may appeal therefrom to the superior court where the judgment or the amount in controversy exceeds twenty dollars, exclusive of costs.
>
> "B. The party aggrieved by a judgment in any action in which the validity of a tax, impost, assessment, toll or a statute of the state is involved may appeal to the superior court without regard to the amount in controversy."

Appellant in his Second Count, concludes that defendants have sought to destroy his business. No material facts are alleged to support this conclusion. It must be assumed

from the pleading (T.R. 4-5, Para. IX) that Appellant concluded that the defendants had been guilty of libel or slander in some manner, although it is impossible to state the act of which he complains. The conclusions could not in any way be molded to state a claim under Art. 1, Sec. 8, Cl. 3 of the Constitution or 49 USC, Chapter 14, Federal Aid for Public Airport Development, Sec. 1110 or the 14th Amendment to the Constitution as alleged in Count I and by reference in Count II of plaintiff's complaint. (T.R., pg. 3-5).

It would be necessary for the court to draw unwarranted inferences of fact and conclusions of law in order to support plaintiff's claim. This should not be done so as to preclude dismissal. Ryan v. Coggin, 10th Cir. 1957, 245 F.2d 54. The general allegation of interference with interstate commerce or the

mere fact that commerce may be involved or affected is not sufficient to state a claim, or to perhaps give the court jurisdiction, where it does not concern the validity, construction or effect of some law regulating commerce. A sweeping, all inclusive allegation is without merit. Adams v. International Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, C.A. Kan. 1959, 262 F.2d 835; Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.C.A. Ill., 1943, 132 F.2d 265, reversed on other grounds 64 S. Ct. 413, 321 U.S. 50, 88 L.Ed. 534; Delaware, L. & W. R. Co. v. Slocum, D.C. N.Y. 1944, 56 F. Supp. 634.

Plaintiff has also concluded that all defendants conspired against him in restraint of trade and by unfair competitive practices

for the purpose of creating a monopoly. It is impossible to tell from plaintiff's pleading what federal laws he claims were violated. Whether it be Sec. 1 of the Sherman Act, 15 U.S.C.A. or in the field of Civil Rights, 42 U.S.C.A. 1985(3), the allegations fall short of stating any justiciable issue. Without a statement of facts constituting the alleged conspiracy or its objects or accomplishment, the mere conclusion is not sufficient to constitute a cause of action. Nelson Radio & Supply Co. v. Motorola, 5th Cir., 1952, 200 F.2d 911; Black & Yates v. Mahogany Ass'n., 3rd Cir., 129 F.2d 227; Neumann v. Bastian-Blessing Co., D. C., 70 F. Supp. 447.

The same is true if the conclusion pleaded was meant to invoke provisions of Civil Rights legislation. Sec. 1985(3), 42

U.S.C.A., does not give a cause of action for conspiracy to deny federally guaranteed rights generally, including the right to due process of law. Dunn v. Gazzola, supra. It must be a deprivation of equality or of equal privileges and immunities. Joyce v. Ferrazzi, 1st Cir., 1963, 323 F.2d 931; Collins v. Hardyman, 1951, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253. The plaintiff must show an invidious discrimination and such purpose will not be presumed. Tarrance v. Florida, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572. The conclusions of plaintiff totally failed to show a "clear and intentional discrimination". Gundling v. Chicago, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497; Powell v. Workmen's Compensation Bd. of State of New York, 2nd Cir.

1964, 327 F.2d 131; Roberts v. Barbosa, D.C. Cal. 1964, 227 F.Supp. 20.

Plaintiff alleged throughout his complaint violations of his civil rights by the defendants, both in their representative and individual capacities. While it is impossible to tell with any certainty the statute under which plaintiff makes his claim, it remains clear that he had not stated a sufficient claim.

The defendant, City of Winslow, is a municipality, which was acting within its sovereign capacity. The courts have consistently ruled that a municipality acting in such capacity is not liable under the statutes to an individual for damages. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492; Williford v. People of California, 9th Cir. 1965, 352 F.2d 474; Charlton v. City of Hialeah, 5th Cir. 1951, 188 F.2d 421;

Mayhue v. City of Plantation, Florida, 5th Cir. 1967, 375 F.2d 447; Tolefree v. Ritz, 9th Cir. 1967, 382 F.2d 566.

The Justice of Peace and Dennis Sweeney, the City Attorney, are, by reason of their judicial offices or capacities, in effect immune from liability under civil rights legislation. In Stift v. Lynch, 7th Cir. 1959, 267 F.2d 237, at pg. 239, Duffy, Chief Judge, stated:

> "It has long been recognized that judges of courts of record and of general jurisdiction are immune from civil liability for acts done by them in the exercise of their judicial functions." Alzua v. Johnson, 231 U.S. 106, 34 S.Ct. 27, 58 L.Ed. 142; Tate v. Arnold, 8th Cir., 223 F.2d 782; Francis v.Crafts, 1st Cir., 203 F.2d 809.

State and prosecuting attorneys have also been extended this same immunity. Stift v. Lynch, supra.; Jennings v. Nester, 217

F.2d 153; Eaton v. Bibb, 217 F.2d 446; Cawley v. Warren, 216 F.2d 74.

The remaining defendants are all members of the City Council of Winslow, or public officers. Their official actions in the discharge of their duties are not generally held to be actionable in the area of Civil Rights. This Court, in Hoffman v. Halden, 9th Cir. 1959, 268 F.2d 280, following O'Campo v. Hardisty, 9th Cir. 1958, 262 F.2d 621, and Cooper v. O'Connor, 1938, 69 App. D.C. 100, 99 F.2d 135, 118 ALR 1440, held that an act of a state or governmental officer was not generally actionable, if discretionary, and pursuant to their lawful authority. See also Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019. The same rule has been applied to city governments and councilmen. Nelson v. Knox, 6th Cir.,

1958, 256 F.2d 312.

The allegations against defendants as individuals were not sufficient, in that an action under any of the civil rights statutes with which we would be concerned, must allege the acts were done under the "color of state law". Hoffman v. Halden, supra. While the right to maintain a suit under the Civil Rights Act, without diversity of citizenship is conceded, the statutes are directed only to state action and the invasion by individuals of the rights of other individuals is not within their purview. Williams v. Yellow Cab Co. of Pittsburg, 3rd Cir. 1952, 200 F.2d 302; certiorari denied, Dorgan v. Yellow Cab Co., 346 U.S. 840, 74 S.Ct. 52, 98 L.Ed. 361.

The lower court's dismissal of plaintiff's complaint is sustained by the reasoning of the foregoing authorities. Under the

applicable cases and statutes, plaintiff failed to state a claim against any of the defendants.

The sole question is whether the court abused its discretion in refusing plaintiff leave to file an amended complaint. The lower court heard oral argument and considered the possible effect of amended pleadings. The lower court stated that:

> "THE COURT: Well, Mr. Hohn, I have read the file, I have read the pleadings, and as I advised you when you first brought it in, I had some serious doubts about it.
>
> "I don't think that you have stated in any of your counts a claim for which relief can be granted in the federal court. I think that your remedy, if any, is in the state court under the state laws.
>
> "It's the order of the court that the motion for dismissal as to all defendants will be granted, and the injunction, which was heretofore issued by stipulation of the parties, will be quashed.

"MR. HOHN: Could I ask leave to amend before this dismissal in light of the fact that this will extinguish the whole thing --

"THE COURT: Mr. Hohn, I can't see any basis from my understanding of the facts of this case on which you could amend so as to state a complaint in this court.

"So in order to bring the matter to a head, the dismissal is without leave to amend the complaint." (R.T. pg. 13, line 25, and pg. 14, lines 1-18).

Appellees are well aware of this Court's rulings that under the Federal Rules, amendments should be liberally allowed. Sidebotham v. Robinson, C.A. Calif. 1954, 216 F.2d 816. Gilbertson v. City of Fairbanks, supra.; Bonanno v. Thomas, 9th Cir. 1962, 309 F.2d 320; United States v. Howell, 9th Cir. 1963, 318 F.2d 162; Breier v. Northern California Bowling Proprietor's Ass'n., 9th Cir. 1963, 316 F.2d 787.

Inherent in each of these decisions, however, is the proposition that if no amount of additional fact or detail could so improve the pleading so as to state a claim upon which relief could be granted upon the theories of law advanced by Appellant on Appeal, then there is not an abuse of discretion by the trial court. Gilbertson v. City of Fairbanks, supra.

Dismissal of a complaint is proper where:

> "... it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 1957, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed. 2d 80; Haldane v. Chagnon, supra.

Appellant did not indicate in any manner or in any particular how his complaint should or could be amended to bring it within the

applicable principles of law which are controlling. Gilbertson v. City of Fairbanks, supra.

While the trial court's judgment does not set forth the reasons for denying plaintiff the right to amend, Bonanno v. Thomas, supra., such reasons are disclosed by the Court's comments contained in the record now before this Court. (R.T. pg. 9-14). Obviously, the trial court did not act in an arbitrary manner, but exercised the discretion inherent to his position.

While a trial judge should exercise with caution the granting of a Motion to Dismiss, "on occasion motions to dismiss supply a useful technique for the prompt disposition of suits, ..." Gruen Watch Co. v. Artists Alliance, 9th Cir., 191 F.2d 700, 705.

While a motion may not take the place

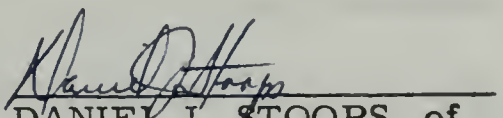
of submission of evidence or findings by the court,

> "... It is obvious that there are cases which justify and indeed compel the granting of such motion. The line between the totally unmeritorious claims and the others cannot be drawn by scientific instruments but must be carved out case by case by the sound judgment of trial judges. ..." Rennie & Laughlin, Inc. v. Chrysler Corporation, 9th Cir. 1957, 242 F.2d 208, 213.

CONCLUSION

The absence of law or fact to support the claims advanced by Appellant in his complaint, together with the trial judge's exercise of sound judgment within his discretion supports this Court's affirmance of the lower court's judgment.

Respectfully submitted this 8th day of March, 1968.



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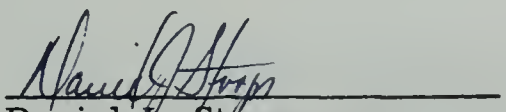
CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules, and I further certify, in compliance with Rule 18, that I have caused to be served upon the attorney for Appellant, three copies of the foregoing Brief.



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